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Focus on Sickness Absence

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Caroline Underhill and Rakesh Patel look at the best ways to represent members on long-term sick leave as well as the difficulties in arguing reasonable adjustments

Dealing with long-term sickness absence

THERE IS plenty of evidence that getting back to work, provided the person is fit enough, helps recovery and retention of employment. It is also generally accepted that employers do not have to tolerate lengthy absences even if they are perfectly genuine and justified.

Helping an employee keep their job is therefore usually about finding changes that can be made to the job or an alternative job that the employee can do despite the long-term condition. Best practice guidance suggests that employers should consider steps that will facilitate an early return to work for someone who may be fit with some help, regardless of whether they have a disability or not.

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For example keeping in touch during absences, phased returns to work and temporary adjustment of duties can all help someone return to work who might otherwise be off sick for longer.

Reasonable adjustments

Section 20 of the Equality Act 2010 states that employers have a duty to make reasonable adjustments to their policies or practices, their physical premises or by providing auxiliary aids to avoid substantial disadvantage to employees who have a disability.

This is usually referred to as the duty to make reasonable adjustments. The obligation on the employer to make reasonable adjustments for a person who has a disability and is on long-term sickness absence is a useful resource to help return the employee to work and for providing a remedy if the employer fails to make the adjustment.

The duty to make reasonable adjustments arises when the employer knows or could reasonably be expected to know that the person is disabled and that they are disadvantaged in some way by one of their policies, the physical premises from which they operate or the failure to provide an auxiliary aid.

A person is disabled under the Act if they have or have had a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Long term means that the condition has lasted for at least 12 months or that it is likely to last 12 months or even the rest of the life of the person affected.

The duty is a duty to make reasonable adjustments as opposed to a duty to consider them or just consult about them. However, if the medical advice given to the employee and the other medical information available from occupational health or other sources makes clear that the employee is not fit for work for the foreseeable future, there is no duty to make the adjustments, unless the employee or the medical evidence suggests that the

employee would be fit to return to work with adjustments.

Some employers try to argue that they have no obligation to make reasonable adjustments until the employee can give them a definite return date, which puts the employee in what is effectively a chicken and egg situation.

The issue is not whether there is a definite return date but whether there is anything that could reasonably be done that would enable the employee to give the employer a return date.

For example in the case of **Home Office -v- Collins** the employer did not have to consider a phased return for an employee off sick for a prolonged period with anxiety and stress unrelated to work and who could give no indication of when he might be fit to do some work.

Compare that with the case of **London Underground Ltd -v- Vuoto** in which the employer was required to make changes that would help the employee return to work (by a further period of redeployment on fixed shifts) even though there was no clear fixed return date.

Three steps

The duty to make reasonable adjustments has to be analysed by identifying the following three steps:

- The provision, criterion or practice (PCP) or physical feature or absence of an auxiliary aid that puts the disabled person at a substantial disadvantage
- The PCP or physical feature or absence of an auxiliary aid does not have that effect on those who are not disabled
- There are reasonable steps that can be taken to avoid the disadvantage.

The duty is a duty to make reasonable adjustments as opposed to a duty to consider them or just consult about them

➲ Many employers now have policies for managing absence that include a provision for making adjustments where it is reasonable to do so for employees who have disabilities. For example adjusting trigger points for warnings for long-term sickness absence.

This has, however, caused some confusion in how to argue a case for an employee when the employer has either failed to use the provisions in the policy to adjust the trigger points or a disagreement on whether any adjustment was sufficient in the circumstances.

There will be further case law on this later this year following the case of **Griffiths -v- The Secretary of State for Work and Pensions**, as it is due to be heard by the Court of Appeal in September 2015.

At a disadvantage

At the moment, however, it would appear from the case law that, in cases of long-term absence due to sickness, the PCP that puts the employee with a disability at a disadvantage will usually be the requirement to have consistent attendance at work.

The disadvantage is the possibility of capability proceedings, warnings and dismissal, if they fail to meet that PCP.

A person who is not disabled would not have the same history of absence.

Therefore steps should be taken to make reasonable adjustments to the requirement for consistent attendance where that would remove the disadvantage.

Case of Carranza

The above approach was suggested in General Dynamics Information Technology Ltd -v- Carranza, although the employee in that case failed to show that there had, in fact, been a breach of the duty to make reasonable adjustments.

The employee had a long period of disability-related absence that resulted in a written warning. Two further short periods of disability-related absence were ignored. The employee was then absent for an unrelated matter and was dismissed.

The Employment Appeal Tribunal (EAT) did not accept that ignoring the written warning was a reasonable adjustment that should have been made; effectively the employer's requirement for consistent attendance won out on balance.

As a result, there is no requirement as a matter of law to ignore all disability-related absence.

Case of Griffiths

Despite the fact that Carranza failed, at least it tried to get around the difficulties for people with disabilities resulting from the approach in Griffiths. Ms Griffiths, who is disabled, was off work for 62 days in 2011 and as a result received a written warning.

She submitted a grievance (and later a tribunal claim) arguing that it would be a reasonable adjustment for the employer to (a) disregard the 62 days' absence with the result that the warning would be withdrawn; and (b) apply a higher "consideration point" (the number of days' absence that would trigger formal action under the employer's absence management policy).

The default consideration point was eight days in any 12-month rolling period, although the policy expressly provided managers with a discretion to increase it for disabled employees. The employment tribunal and the EAT found that there was no PCP that put Ms Griffiths at a substantial disadvantage compared to those who were not disabled. This was because the policy of issuing warnings after a trigger point would have applied in the same way to someone who was not disabled. Ms Griffiths was not therefore disadvantaged, compared to a person who was not disabled, by the operation of the trigger point for a warning.

In her appeal Ms Griffiths argued that, because of her disability, she was more likely than her non-disabled colleagues to suffer a level of sickness absence that reached or exceeded the consideration point when formal action would be taken under the policy. Further, her disability created a substantial risk that absences related to her disability would absorb the eight days of sickness absence which better reflected the level of absence that any employee might incur as a result of occasional ailments.

Absence management policies

In reality both the **Griffiths** and the **Carranza** cases illustrate the difficulties that claimants face when trying to argue that employers have failed to make reasonable adjustments when applying an absence management policy.

This does not mean that these arguments should not be deployed but they should run alongside other arguments about changes that would reduce the level of sickness absence.

In other words, the key is likely to be the action that can be taken to reduce the level of absence.

Relying solely on adjustments to absence management procedures will rarely be sufficient (pending some change in case law), so union members need to identify other modifications and changes or adjustments employers can reasonably carry out that will reduce their level of sickness absence.

For example, depending on the circumstances, changing job location, changing work equipment, giving some of the tasks to another person, arranging a mentor or work buddy, working in a team rather than by themselves or vice versa. These are just examples. What might work depends on the disability and what will help get the employee back to work. Sometimes it will be a combination of adjustments.

Union members need to identify other modifications and changes or adjustments employers can reasonably carry out that will reduce their level of sickness absence

Identify the disadvantage

Having identified the PCP, the next stage is to identify the substantial disadvantage caused by that PCP. This is important because the duty to make reasonable adjustments is aimed at targeted adjustments to deal with the particular substantial disadvantage rather than general adjustments. In other words, identifying what is causing the disadvantage identifies the PCP. ➲

The substantial disadvantage must, however, be "in comparison with persons who are not disabled". In **Griffiths** the EAT ruled that the proper comparator for the purposes of establishing disadvantage was a non-disabled person, absent for sickness reasons for the same amount of time as the claimant, but not for a disability-related reason.

If a claimant was treated as well as those comparators, she could not be at any disadvantage. The reasonable adjustments duty did not therefore arise.

We think that the EAT decision is wrong. Effectively it said that the comparator must not be in materially different circumstances to the claimant. This is the definition of "comparators" under the Equality Act 2010 which applies to direct discrimination. But **Griffiths** is about a failure to make reasonable adjustments and not direct discrimination.

There is nothing in the Act that says, in a reasonable adjustment case, the comparator must not be in materially different circumstances. This aspect of the **Griffiths** decision is also contrary to European law.

In sickness absence cases the disadvantage is the fact that the employee is off sick and therefore vulnerable to the absence management policy.

So for example in **Vuoto**, the employee was off sick because of stress exacerbating his multiple sclerosis. The stress was caused by London Underground requiring him to change his shift patterns and work location away from previously agreed adjusted shifts.

Had he returned to the previously agreed shifts he would not have been under stress and would have been able to return to work. The PCP was not just the absence management policy but also the criteria that he had to work the shifts that management wanted him to work. That put him at a substantial disadvantage as the requirement to work shifts caused him stress, which made him ill.

Union reps should not forget to look at adjustments to the physical workspace that might help keep someone in work or help them return from sick leave

The important thing to remember is that there is no requirement to consider the reasonableness or otherwise of adjustments unless and until there is a duty to make those adjustments. It is therefore very important to identify the PCP, physical feature or relevant matter and also the substantial disadvantage. Once that is identified, only then is it possible to decide on the reasonableness of any adjustment.

Other possible adjustments

Union reps should not forget to look at adjustments to the physical workspace that might help keep someone in work or help them return from sick leave. For example moving a workstation closer to a toilet if the person has mobility problems or a disability affecting continence.

Equally, reps should not overlook adjustments by way of auxiliary aids such as voice-activated software or other aids that would enable a disabled person to carry out their duties.

Discrimination arising from disability

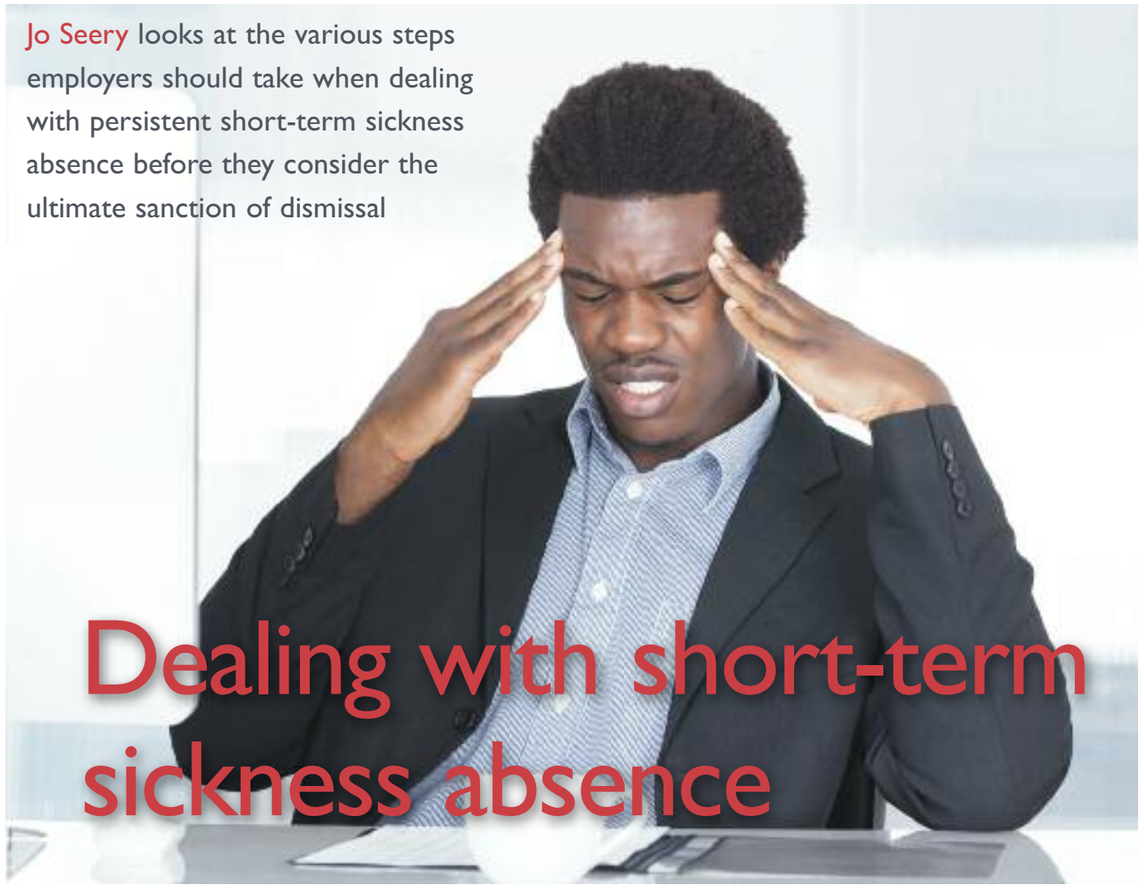
Finally, when advising employees on long-term sickness absence, in addition to reasonable adjustments, it is also useful to consider "discrimination arising from disability".

Under the Act, this occurs when A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is justified.

For instance, an employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself (so not direct discrimination).

However, the worker has been treated unfavourably because of something arising in consequence of her disability, namely the need to take a period of disability-related sick leave. The issue then will be whether dismissal is a proportionate means of achieving a legitimate aim.

Jo Seery looks at the various steps employers should take when dealing with persistent short-term sickness absence before they consider the ultimate sanction of dismissal



Dealing with short-term sickness absence

DESPITE THE government's claim that we are now in a period of economic growth, many organisations still continue to review their employment policies.

The annual CIPD Absence Management Survey for 2014 reported that more than half the organisations covered by the survey had introduced new measures for monitoring sickness absence. The most common are devolving responsibility to line managers, return to work interviews and triggers to review absence.

The law makes clear that persistent short-term sickness absence can be a fair reason for dismissal. Whether an employer acts reasonably when dismissing an employee on this ground will, however, depend on the reason for the dismissal.

Identifying the reason for dismissal

If it is due to skill, aptitude, health or any other physical or mental quality then the reason for the dismissal is capability and employers are expected to follow a certain procedure.

However, not all dismissals for short-term sickness absence are because of capability. In **Wilson -v- Post Office**, for instance, the Court of Appeal held that dismissal for high levels of short-term sickness absence amounted to a failure to meet attendance targets or a failure to comply with an attendance procedure and therefore the dismissal was for some other substantial reason (SOSR).

The law makes clear that persistent short-term sickness absence can be a fair reason for dismissal

In other cases, an employee may be dismissed for misconduct but this should be

➲ limited to cases where the reason for the absence is not genuinely due to health. The courts have cautioned against treating absenteeism for health reasons as dismissal for misconduct, as in **Lynock -v- Cereal Packaging.**

Capability or some other substantial reason

It is not always easy to identify whether the reason for the dismissal is capability or SOSR. Employees who are dismissed for the latter when the reason was, in fact, due to ill health absence (and therefore on grounds of capability) may succeed in a claim for unfair dismissal if the employer has not acted reasonably.

Case law has established that employers have not acted reasonably unless they have:

- Carried out a fair review of the attendance record and reasons for the absence
- Given the employee an opportunity to make representations, and
- Warned the employee that they may be dismissed if things don't improve.

Carrying out a fair review

Although employers are not expected to obtain a medical report when reviewing short-term sickness absence, they are expected to consider whether there is any underlying cause for intermittent or unconnected periods of sickness absence.

Employees are advised to see their GP to establish if there is an underlying cause for frequent absence because of sickness even if the reasons are unconnected

Employees are advised to see their GP to establish if there is an underlying cause for frequent absence because of sickness even if the reasons are unconnected. If, however, they are due to an employee's disability, and the employer ought reasonably to have known about it, they could be liable for a claim for disability discrimination.

Many employers have attendance or absence policies that can trigger the capability or disciplinary procedure. Typically these state that, when sickness absence reaches a certain level, then the capability or disciplinary procedure is triggered. For example, three periods of sickness absence in a rolling, 12-month period may trigger a first interview with further absence triggering the next stage of the procedure.

One such trigger absence procedure, which seems to be rearing its ugly head again, is the Bradford factor, which involves multiplying the square of the number of periods of absence by the number of days.

This is designed to weigh more heavily against short-term absences. For example, one period of five days absence will give a Bradford factor of 5 ($1^2x5 = 5$) whereas five periods of one day's absence will give a Bradford factor of 125 (5^2x5). The higher the factor the more likely the employee will be progressed through the capability or attendance procedure.

This approach could put those who have a disability at a particular disadvantage if the disability causes them to have frequent short-term absences.

However, there is no rule that an employee who is dismissed because some short-term absences are related to disability is always unfair. Where the majority of absences are due to disability the employer should follow the procedure for long-term sickness absence (see earlier article Pg 2).

Opportunity to make representations

Frequently, employers carry out a return to work interview following a period of absence. It is important at this interview that employees inform the employer if they have an underlying medical condition or if there are other reasons for their absence such as domestic violence or work-related stress.

Tribunals are more likely to expect employers who are aware of the underlying causes to treat the employee with sympathy, understanding and compassion, as in Lynock -v- Cereal Packaging.

Employers who make assumptions about an employee's sickness absence and dismiss them for misconduct without investigating the reasons for absence or consulting with them are likely to be found to have unfairly dismissed the employee.

Giving warnings

Employment tribunals take the view that there comes a time when the employer is entitled to say that enough is enough. In that case, tribunals will also take into account whether the employee was warned that their absence was at a level that might result in dismissal and if the employee was given an opportunity to improve.

There are, however, no hard and fast rules as to the level of absence at which it is reasonable for an employer to dismiss an employee; that will depend on the circumstances of the case.

Acas guidance on disciplinary and grievances recommends that employees should be told what improvement in attendance is expected and warned of the likely consequences if this does not happen. As a result, many employers keep absence records to monitor it accurately.

Employers should not dismiss employees because of absence just to make a point nor should employers add on warnings for absence to other matters in order to justify a dismissal.

Likewise employers must stand by the warning. For example, in **Scott -v- Birmingham City Council** an employee was warned that, if he had further sickness absence within six months, a capability hearing would be held. A letter was sent to the employee giving him a further six months to improve his attendance.

Two months after sending that letter the employer dismissed the employee at another capability hearing. In that case, the tribunal held that, having given the employee a further six months to improve, the employer had misled the employee and therefore the dismissal was unfair.

Opportunity to improve

Similarly employers who fail to take into account the fact that the employee has improved may be held to have unfairly dismissed them. Having said this, an employer can rectify this error at the appeal stage.

The Acas guide provides that if there is no improvement then employers should take account of the following when deciding what action to take:

- The employee's length of service
- The likelihood of a change in attendance
- The availability of suitable alternative employment, and
- The effect of past and future absences on the organisation.

If the employer has caused the employee's ill health they would be expected to go the extra mile in seeking suitable alternative employment

The fact that an employee has long service does not mean that the employer is required to undertake a more thorough investigation, as in **Dundee City Council -v- Sharp**.

However, if the employer has caused the employee's ill health they would be expected to go the extra mile in seeking suitable alternative employment, as was found in **Royal Bank of Scotland -v- McAdie**.

Tribunals can take into account past absence records as well as the likelihood of future absences when determining whether or not dismissal for persistent short-term absence is fair.

The fact that an employee is still entitled to sick pay at the time of dismissal will not necessarily make the dismissal unfair.

Conclusion

Where there is a collectively agreed capability or attendance procedure, the employer should follow this before dismissing an employee for short-term sickness absence. Where there is no agreed procedure, the employer should follow the steps outlined above.

Likewise employees should ensure that they provide evidence of any underlying causes of short-term sickness absence, particularly if the absence is work-related, so as to put the onus back on the employer to consider alternatives to dismissal.

Mark Alaszewski provides an overview of the government's Health and Work Service which was introduced to help employers better manage sickness absence

An overview of the Health and Work Service

THE HEALTH and Work Service (HWS), a new government funded occupational health scheme, was introduced by the Department of Work and Pensions on a phased basis in January 2015.

Its stated aim is to reduce sickness levels within the workplace by providing early interventions to assist employers in managing sickness absence. The scheme is particularly aimed at smaller employers who historically have had little engagement with occupational health services.

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The contract to run the service has been awarded to the private sector provider MAXIMUS in England and Wales and is aiming for full geographic coverage before the end of 2015.

Referrals and assessments

Referrals to HWS are made by GPs and are triggered when employees have been absent on sick leave for a period of four weeks. GPs have little discretion about whether to refer to the service as a referral is the default option and reasons for non-referral are limited and defined.

Once a referral has been made to the service, a first assessment takes place within two working days. Assessments are conducted by telephone or over the internet by HWS advisers. The scheme's advisers are healthcare professionals who have occupational health qualifications, experience or are "able to demonstrate experience and skills appropriate to working in an occupational health context".

Return to work plan

The adviser will then produce a personalised return to work plan, which will be provided to the employer and employee within two working days of the assessment. The plan will identify the barriers preventing the employee from returning to the workplace, provide advice on how these may be overcome and a realistic timetable within which a successful return to work could be achieved. A case manager will then be responsible for implementing the plan.

Employees do not have to participate in HWS although participation will be treated as evidence of entitlement to statutory sick pay (SSP) and fitness for work, replacing the current system of GP "fit notes".

In this respect the DWP wields a significant "stick" in forcing employees to participate in HWS and comply with the scheme's return to work plans, not least because, if they opt out of the scheme or do not comply with the return to work plan, they risk losing their entitlement to SSP.

Good or bad for employees?

While HWS is still bedding down, it is difficult to assess whether the scheme is likely to be beneficial for employees and the extent to which it will affect employment litigation. In principle a fully comprehensive occupational health service promoting the general principle of early intervention to resolve work-related health issues is not necessarily a bad thing for employees.

There are also potential benefits for employees in terms of taking the occupational health function out of the hands of employers. In theory, referrals are less likely to be manipulated by management to try and engineer outcomes which assist the employer, most obviously in providing evidence in support of dismissals for capability/ill health.

However the objectives and scope of HWS raise a number of danger signals in terms of the objectivity of the scheme and employee representatives should treat HWS reports with considerable caution if employers seek to use them as evidence in workplace disputes.

It is worth noting that HWS is extremely low cost with the DWP allocating a maximum of around £100 for each assessment. On this kind of budget and with very limited contact time between advisers and employees (and with no face to face contact) it is difficult to see how the scheme can produce anything other than an extremely basic assessment that may have limited application in more complex workplace disputes, such as those involving long-term ill health and disability.

The purported aim of HWS in reducing absenteeism in the workplace may also be problematic if it promotes overly optimistic return-to-work plans that underestimate both the extent of the employee's condition and the obstacles to a successful return to work. This will be further exaggerated if the scheme has an implicit aim in reducing government spending on work-related welfare payments. Although there is nothing in the literature around HWS to suggest this is the case, given the status of the scheme as the gateway to statutory sick pay, it would be naïve to discount this as a possibility.

These issues give rise to a potential risk that HWS will operate in a manner similar to the controversial medical assessments by the private sector provider ATOS healthcare, which have been used to establish eligibility for disability welfare benefits and are widely perceived to be skewed against claimants.

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When applied to workplace assessments, the likely outcome will be that employees will be pressured into returning to work before they are properly fit and able to do so and will become vulnerable to capability procedures if they do not comply with the targets set out in reports, which may have been compiled in haste and with partial and inaccurate information.

Even if this is not the case, there may be tension between HWS assessments and the assessments of GPs and other occupational health providers. This could mean that a service intended to resolve and simplify the often difficult and disputed territory around long-term sickness absence may actually do the reverse and add a further layer of complexity.

Conclusion

The best advice for employee representatives is to be extremely sceptical of HWS reports, at least until the credibility of the service is established, and to encourage employees to challenge unfavourable reports with their own independent medical evidence.

The generally unfavourable legal tests applicable to ill health dismissals require employees to do this at the earliest possible stage because if unfavourable reports are not challenged during the capability process it will be extremely difficult to overturn dismissals at tribunal.

LELR aims to give news and views on employment law developments as they affect trade unions and their members. This publication is not intended as legal advice on particular cases.

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Contributors to this edition: Mark Alaszewski, Rakesh Patel, Jo Seery, Caroline Underhill
Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
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